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IN THE

Supreme Court of The United States

October Term, 1963

No. 669

HATTIESBURG BUILDING AND TRADES COUNCIL, et al.,

Petitioners,

versus

J. D. BROOME, doing business as Broome Construction and Maintenance Company, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR NOT GRANTING THE WRIT	5
CONCLUSION	8
CERTIFICATE OF SERVICE	8
APPENDIX A — Pertinent provisions of National Labor Relations Act	9
APPENDIX B — Mississippi right-to-work-law	10

TABLE OF CASES

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957)	5
Hattiesburg Building & Trades Council v. Broome, 153 So. 2d 695 (Miss. 1963)	5
International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957)	7
Local Union No. 429 v. Farnsworth & Chambers Co., 353 U.S. 969 (1957) *reversing* 201 Tenn. 329, 299 S.W. 2d 8	7
Local No. 438 v. Curry, 371 U.S. 542 (1963)	7
Myers v. Camille Painters, 131 N.L.R.B. 72	6
Siemons Mailing Service, 122 N.L.R.B. 81 (1958)	6

CONSTITUTIONS, STATUTES AND LEGISLATIVE REPORTS

	Page
National Labor Relations Act, section 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b)	2
National Labor Relations Act, section 14(c), 73 Stat. 541 (1959), 29 U.S.C. § 164(c)	2, 5, 7
Mississippi right-to-work law, Miss. Const. art. 7. § 198-A	2

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Respondents oppose the petition for a writ of certiorari filed herein, and respectfully pray that the petition be denied.

QUESTION PRESENTED

The petitioners incorrectly state the question presented. They assume facts [i.e., that the employer was engaged in interstate commerce or a business affecting interstate com-

merce] which are not reflected by the record. Correctly viewed, the question presented is:

> Does the doctrine of federal pre-emption prohibit a state court from enforcing its right-to-work law by enjoining unlawful picketing of an employer over whom it has not been shown the National Labor Relations Board would assert jurisdiction?

STATUTES INVOLVED

The applicable provisions of the National Labor Relations Act, sections 14(b) and (c), 61 Stat. 151 (1947), 73 Stat. 541 (1959), 29 U.S.C. § 164(b) and (c), are set forth in Appendix A, *infra*, p. 9. The Mississippi constitutional right-to-work law, Miss. Const. art. 7, § 198-A, is set forth in Appendix B, *infra*, p. 10.

STATEMENT

J. D. Broome was engaged in the industrial maintenance and small construction business in South Mississippi. Broome consistently followed a policy of not requiring either membership or nonmembership in labor unions by his employees and of avoiding any interference with their freedom of choice. Some of his employees were members of various labor unions but most of them, by personal choice, were not. (R. pp. 46, 338-339).

The evidence proved, and the trial court found, that petitioners demanded that Broome enter into some type of agreement whereby he would employ all of his workers through the business agents of these unions, that he grant

petitioners an employment monopoly in his business, that he employ only union members, that he put pressure upon and coerce his employees to join these unions, even against their will, and that he discharge any who failed to do so. Broome consistently refused to submit to these demands. (R. pp. 47, 339-344). Therefore, petitioners placed picket lines at places where Broome was performing work, including Pontiac Eastern Corporation's oil refinery in Lamar County, Mississippi, to force Broome to submit to their demands and, in turn, coerce his employees into joining these unions against their will or lose their jobs. (R. p. 48).

Broome and ten of his employees, respondents herein, filed a bill of complaint in the Chancery Court of Forrest County, Mississippi, for temporary and permanent injunctions against the petitioners herein, charging that their action was in violation of the constitution and public policy of the State of Mississippi, and in violation of the rights of the complainants and other employees of Broome similarly situated. (R. pp. 2-11). Petitioners filed a motion to dissolve the temporary injunction which was issued and an answer containing several affirmative defenses, including a plea to the jurisdiction based upon the doctrine of federal pre-emption by the National Labor Relations Act. In addition, the answer denied that the picketing was in violation of the Mississippi right-to-work law (R. pp. 32, 36-44). Hearing was held on the motion to dissolve, including the plea to the jurisdiction, and at the conclusion of all of the testimony presented by both sides, the parties agreed that the Court should decide the case finally, on the merits, on the testimony thus taken. (R. p. 423).

On the question of jurisdiction, the petitioners contended

that there was a labor dispute solely within the jurisdiction of the National Labor Relations Board and, therefore, the state court had no jurisdiction. They offered absolutely no evidence to show that J. D. Broome, against whom picketing was directed, was engaged in interstate commerce or in any business activities which affected interstate commerce, or that Broome did any business outside of Mississippi, or made purchases from outside the state, or did any business with any concern which itself was engaged in interstate commerce, or the volume of any business done by Broome whatsoever. Petitioners merely proved that Broome did *some* business with Pontiac, but the amount or volume thereof was not shown. Even with respect to Pontiac, petitioners' own evidence showed that all of its products were sold within the State of Mississippi (R. p. 67) and there was no probative evidence that any of its products left the state.

The Chancery Court, after hearing all of the evidence presented by both sides, including the testimony of twenty-three witnesses, made findings of fact and conclusions of law. With respect to its jurisdiction, the Court found:

> ". . . The evidence fails to show the existence of the facts or circumstances which are necessary for the National Labor Relations Board to assert jurisdiction. On the contrary, it appears that J. D. Broome's business activities are of a purely local, intrastate nature." (R. p. 46).

The Court further found that the picketing was for an unlawful purpose in violation of Mississippi's right-to-work constitutional provision and made the injunction permanent.

On appeal, the Mississippi Supreme Court affirmed, holding that the trial court's finding of facts was "manifestly right" and that "no other reasonable or rational conclusion could have been reached". 153 So. 2d at 703.

REASONS FOR NOT GRANTING THE WRIT

The State Court Had Jurisdiction: Congress Has Expressly Authorized State Courts to Act in Cases Where It Is Not Shown the N.L.R.B. Would Assert Jurisdiction.

This Court held in *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957), that a state was precluded from acting in a labor dispute, even though the Board would decline to exercise jurisdiction because the employer's business did not meet one of the Board's jurisdictional standards. The Court noted the policy objections to existence of such a no man's land, subject to regulation by no agency or Court, adding: "Congress is free to change the situation at will." 353 U.S. at 11. Thereafter Congress amended the National Labor Relations Act in 1959 by adding subparagraph (c) to section 14. See Appendix A, *infra*. This amendment gave legislative sanction to the Board's use of jurisdictional standards and expressly permitted state courts to assume and assert jurisdiction over disputes over which the Board would not assert jurisdiction.

The Board's nonretail jurisdictional standard is $50,000 annually outflow or inflow, direct or indirect. For the purposes of applying this standard, direct outflow refers to goods shipped or services furnished by the employer outside the state. Indirect outflow refers to sales of goods or

services to users meeting any of the Board's jurisdictional standards *except the indirect outflow or indirect inflow standard.* Direct inflow refers to goods or services furnished directly to the employer from outside the state. Indirect inflow refers to purchase of goods or services which originate outside the employer's state. *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958). The Board applies its nonretail standards to construction and maintenance contractors. *Myers & Camille Painters*, 131 NLRB 72.

The record here does not disclose that Broome was in any way directly engaged in interstate commerce and petitioners do not contend that he was. Rather, petitioners argue that Broome performed some services for Pontiac Eastern Corporation, which sold all of its products to Gulf Oil Corporation within the State of Mississippi, and that Gulf in turn shipped some of them out of the state; thus, Broome met the Board's nonretail standards because of *indirect outflow* consisting of services rendered to Pontiac. Respondents do not concede that there is any probative evidence in the record that any of Pontiac's products ever left the State of Mississippi; but even assuming that they did, the record does not disclose that the Board would assert jurisdiction over *Broome's* operations. His operations failed to meet the test in at least two particulars. First, there is no showing that the value of his services to Pontiac amounted to $50,000 annually. Second, Broome's services to Pontiac would not meet the Board's indirect outflow standard because indirect outflow refers to "sales of goods or services to users meeting any of the Board's jurisdictional standards *except the indirect outflow or indirect inflow standard.*" *Siemons Mailing Service, supra.* (Emphasis added). Thus it appears that the Board would not take jurisdiction over

Broome even if Gulf shipped in commerce some of the oil it purchased from Pontiac. This being so, the case falls within the scope of section 14 (c) (2) of the Act, 29 U.S.C. § 164 (c) (2), permitting state courts to assume and assert jurisdiction where the Board would decline to do so.

Local No. 438 v. Curry, 371 U.S. 542 (1963) and *Local Union No. 429 v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957), *reversing* 201 Tenn. 329, 299 S.W. 2d 8, are distinguishable from the case at bar. In *Curry* the parties stipulated that Curry's operations met the direct inflow standards of the Board. 371 U.S. at 545. In the *Farnsworth & Chambers* decision, the employer was a large international contractor and there was no question but that its operations were such as to meet the Board's jurisdictional standards.

The record here reflected that Broome's business activities were of a purely local, intrastate nature. It is undisputed that a state court may constitutionally enjoin peaceful picketing which is conducted for an unlawful purpose in violation of state law and state public policy. *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957). The state court was clearly empowered by section 14 (c) (2) of the Act to enforce its right-to-work constitutional provision and to prohibit further violation thereof by the petitioners.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition herein should be denied.

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February 3, 1964

CERTIFICATE

I hereby certify that I have this day served by certified mail, postage prepaid, one copy of the above and foregoing Brief in Opposition to the Petition for Certiorari on each of the counsel for petitioners: Honorable Ralph N. Jackson, Jackson & Hess, 1310 Oil & Gas Building, New Orleans, Louisiana, and Honorable Knox W. Walker, Attorney at Law, Gulfport, Mississippi.

THIS 3d day of February, A. D., 1964.

Richard C. Keenan

APPENDIX A

The pertinent provisions of the National Labor Relations Act, Sections 14(b) and (c), 61 Stat. 151 (1947), 73 Stat. 541 (1959), 29 U.S.C. § 164 (b) and (c), are as follows:

> (b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.
>
> (c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to

paragraph (1) of this subsection, to assert jurisdiction.

APPENDIX B

The Mississippi "right-to-work" law, adopted as a constitutional amendment in 1960, Miss. Const. art. 7, § 198-A, is as follows:

> Section 198-A. It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. No employer shall require any person, as a condi-

tion of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reason of such denial or deprivation of employment.

The provisions of this section shall not apply to any lawful contract in force on the effective date of this section, but they shall apply to all contracts thereafter entered into and to any renewal or extension of an existing contract thereafter occurring. The provisions of this section shall not apply to any employer or employee under the jurisdiction of the Federal Railway Labor Act.